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No. 726

In the Supreme Court of the United States

OCTOBER TERM, 1959

BURLINGTON-CHICAGO CARTAGE, INC., APPELLANT

v.

UNITED STATES OF AMERICA AN
INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

MOTION TO AFFIRM

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MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(e), of the Revised Rules of this Court, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment entered on November 30, 1959, by a three-judge district court convened under 28 U.S.C. 2284 and 2325, dismissing the appellant's complaint seeking to set aside an order of the Interstate Commerce Commission. As here relevant, the Commission's report and order (J. St. 13–32) interprets the operating authority con-

ferred by a certificate of public convenience and necessity acquired by the appellant.

The appellant applied in 1949 for authority, as required by Section 5 of the Interstate Commerce Act (49 U.S.C. 5), to acquire, by purchase, the operating rights of Chicago-Nebraska Motor Express. In reversing a prior determination, the Commission approved the appellant's application to purchase the other carrier's operating authority. *Burlington-Chicago Cartage, Inc.—Purchase—Smith*, 58 M.C.C. 465 (1952). In this report the Commission set forth its interpretation of the now disputed portion of the certificate then held by the appellant's vendor, which, as here pertinent, reads as follows (J. St. 4-5):

> *General Commodities* * * *
>
> From Chicago, Ill., to Hastings, Nebr. * * *
>
> Return, with no transportation for compensation except as otherwise authorized, over these routes to Chicago.
>
> Service is authorized to and from the intermediate points of Peoria, Rock Island, and Moline, Ill., Davenport and Council Bluffs, Iowa, and Omaha, Lincoln, and Fairmont, Nebr., and the off-route points of Canton, Ill., Clinton, Iowa, and Beatrice, Nebr.

The Commission determined (J. St. 29-30) that the foregoing operating authority allows "one-way service from Chicago westward to Hastings, with service to and from the specified intermediate and off-route points on westbound traffic only." Thus, transportation is authorized of a shipment originating or terminating at Peoria, Illinois, but only in connection with westward

movements, and no east-bound movements are permitted." The appellant's petition for reconsideration of this determination was denied by the Commission on January 5, 1953 (J. St. 36). Following consummation of the Commission-approved purchase, a certificate reflecting the newly acquired rights was issued to the appellant on September 23, 1953 (*ibid.*). The language setting forth the operating rights acquired through the purchase "was revised to indicate with greater specificity than the original certificate * * * that only west-bound transportation for compensation was permitted as to all points" which the appellant was permitted to serve (*ibid.*).

In April, 1958, some five years later, the appellant petitioned the Commission to find that the operating authority under consideration authorizes both east-bound and west-bound service to and from the off-route and intermediate points. The Commission, relying on its earlier interpretation, denied the petition, and denied a petition for reconsideration (J. St. 36). There followed the present suit, in which the three-judge district court unanimously held that no ground had been shown for setting aside the Commission orders which give effect to its interpretation of the appellant's certificate.

ARGUMENT

As this Court stated in *Nelson* v. *United States*, 355 U.S. 554, 558, the courts "are not given *carte blanche*" in ascertaining the meaning of the words used in a certificate of operating authority issued by the Commission; and the Commission's construction "is con-

trolling on the courts unless clearly erroneous." In the present case the court below stated that the Commission's interpretation of the rights here involved cannot be said to be "arbitrary, or capricious, or clearly erroneous" (J. St. 43). The basic grant was of one-way operating authority, "from" Chicago "to" Hastings. Authorization of service to and from intermediate and off-route points was subsidiary to this basic grant, and permitted service to and from intermediate points in the course of proviiding westward transportation. At the very least, the interpretation thus adopted by the Commission is reasonable. The court below noted that the strongest possible case to be put for the appellant is that the text of its certificate is ambiguous, but the court properly noted that mere ambiguity is not ground for overruling the Commission's interpretation (J. St. 43).

We submit that the appellant's reliance (J. St. 8–9) upon the italicized words in the sentence, "Return, with no transportation for compensation *except as otherwise authorized*, over these routes to Chicago," is misplaced. The italicized exception is a standard phrase used in certificates granting one-way authority. The reason for reference to the return movement is that authority is required for empty movements of motor vehicles in connection with interstate service as a common carrier.[1] A further reason for such exception is to avoid possible conflict with

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[1] *Wasie Common Carrier Application*, 4 M.C.C. 726, 729; *O.K. Motor Service, Inc., Common Carrier Application*, 30 M.C.C. 95, 99; *United Truck Lines, Inc., Transfer of Empty Equipment*, 32 M.C.C. 676, 678.

other grants of authority to the certificate holder. Thus, the certificate which the appellant holds contains the following grant (see Exhibit A (p. 2) attached to its complaint):

> *Wire, wire products,* and *iron and steel fence posts,*
> From Peoria, Ill., to Burlington, Iowa, with no transportation for compensation on return except as otherwise authorized.

Aside from the foregoing, the appellant appears to be barred from attacking the certificate because it invoked the authority of the Commission to obtain the certificate, which it accepted pursuant to Commission authorization knowing that the Commission interpreted the certificate as authorizing only westward movements. See *Callanan Road Co. v. United States*, 345 U.S. 507. The appellant therefore "accepted the transfer with the limitations contained in the certificate" and "now will not be heard to say it is entitled to receive more than its transferor had." 345 U.S. at 513. We submit that *Callanan* is not distinguishable, as the court below thought (J. St. 37-38), upon the ground that here, but not in *Callanan*, the vendee, at the time it sought authority to purchase, requested the Commission to give the certificate the interpretation which appellant now asserts. Its acceptance of the certificate, without seeking judicial review of the Commission's ruling, would appear to estop it from attacking that ruling in a proceeding instituted some five years later.

CONCLUSION

For the foregoing reasons, the decision below is correct and should be affirmed.

Respectfully submitted.

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